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IN THE

Supreme Court of the United States

October Term
1963

No. 939

HARLOW CHAMBERLIN, on his own behalf and in behalf of all others similarly situated,

Appellant,

vs.

THE DADE COUNTY BOARD OF PUBLIC INSTRUCTION, et al.,

Appellees,

vs.

DAVID HUME, et al.,

Intervening Appellees.

EDWARD RESNICK, PHILIP STERN, AND ELSIE THORNER, in their own behalf, and in behalf of all other persons similarly situated,

Appellants,

vs.

THE DADE COUNTY BOARD OF PUBLIC INSTRUCTION, et al.,

Appellees,

vs.

DAVID HUME, et al.,

Intervening Appellees.

MOTION OF APPELLEES, THE DADE COUNTY BOARD OF PUBLIC INSTRUCTION, ET AL., TO DISMISS

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TOPICAL INDEX

	Page
Statement of the Case	2
Federal Questions Not Properly Raised	4
Argument	
I. Daily Bible reading under Fla. Stat. Sec. 231.09(2) does not violate First Amendment to United States Constitution	6
II. Appellants have no standing to complain of religious and sectarian baccalaureate programs	8
III. Appellants have no standing to raise issue of religious census	9
IV. Appellants have no standing to complain of religious tests as qualification for employment of teachers	10
Conclusion	11
Proof of Service	12

TABLE OF AUTHORITIES

Cases

	Page
Coffman v. *Breeze Corporation*, 323 U.S. 316, 65 Sup. Ct. 298 (1945)	8, 10
Doremus v. *Board of Education*, 342 U.S. 429, 72 Sup. Ct. 394 (1952)	8, 9
McGowan v. *State of Maryland*, 366 U.S. 420, 81 Sup. Ct. 1101 (1961)	7
Murray v. *Curlett*, 374 U.S. 203, 83 Sup. Ct. 1560 (1963)	6
Muskrat v. *United States*, 219 U.S. 346, 31 Sup. Ct. 250 (1911)	9
Poe v. *Ullman*, 367 U.S. 497, 81A Sup. Ct. 1752 (1961)	8
School District of Abington Township v. *Schempp*, 374 U.S. 203, 83 Sup. Ct. 1560 (1963)	6
Tileston v. *Ullman*, 318 U.S. 44, 63 Sup. Ct. 493 (1943)	8, 10
Tyler v. *Judges of the Court of Registration*, 179 U.S. 405, 21 Sup. Ct. 206 (1900)	10
Voeller v. *Neilston Warehouse Co.*, 311 U.S. 531, 61 Sup. Ct. 376 (1941)	8

TABLE OF AUTHORITIES cont.)

	Page
Statutes	
Annotated Code of Maryland, Art. 77, §202	6
Florida Statutes, Sec. 231.09	4
Florida Statutes, Sec. 231.09(2)	3, 6
Purdon's Pa. Stat. Ann. §15-1516	6
Other Authorieies	
First Amendment, United States Constitution	4
Fourteenth Amendment, United States Constitution	4
Sup. Ct. Rule 16(1)(b)	11

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Appellees, The Dade County Board of Public Instruction, et al., pursuant to Rule 16 of the Revised Rules of this Court, move to dismiss the appeal upon the grounds (A) that the Appellants have no standing to raise the questions so presented, and (B) that there is no justiciable issue raised by the enumerated questions.

STATEMENT OF THE CASE

These are two separate actions challenging the constitutionality of a variety of alleged religious practices taking place in the schools of Dade County, Florida. The Appellant Chamberlin is the father of two children in the public schools of Dade County, one child being enrolled in the North Miami Elementary School and the other child enrolled in the North Miami High School as of the time of completion of the trial. The Appellant Thorner is the parent of a child in Sunset Elementary School and the Appellants Stern and Resnick are parents of children in Biscayne Elementary School. After a trial on the issues, Circuit Judge J. Fritz Gordon rendered his decision dismissing the complaint with relation to the conducting of religious and sectarian baccalaureate programs, the conducting of a religious census among the children to ascertain their own affiliation and that of their parents, and the conducting of religious tests as to the qualifications of teachers for employment. The Appellants took an appeal to the Supreme Court of Florida from the above-mentioned rulings and others of the Circuit Court. The Florida Supreme Court, inter alia, affirmed the lower Court as to its ruling on baccalaureate programs, religious census and religious tests for teachers. The evidence at the trial reflected that the children of the Appellant parents were all enrolled in elementary schools except for the older Cham-

berlin child who was to be enrolled in North Miami Senior High School in the tenth grade at the time of completion of the trial. (TR 112). None of the children testified and neither the Appellant parents nor anyone else testified that the children of Appellants had been subjected to a religious census, as alleged in the complaint. The evidence did indicate that, as a rule, the permanent record filled out by parents or children, depending on age of child, reflects religious preference of the child (TR 537). The testimony of Appellant parents did not indicate that they or their children had filled out such a record. Evidence was adduced at the trial that certain questions as to religious preference were asked of pupils in Palmetto Senior High School (TR 1206) and in North Miami High School (TR 345, 378); however, there was no evidence connecting Appellant's children with these two isolated incidents. The record indicates that all of the Appellants were parents of children enrolled in the public schools of Dade County and does not establish that any of said parents were teachers in the Dade County School System, nor were the Appellants so designated in the pleadings.

The lower Court summarily dismissed the complaint with reference to the allegations of conducting religious tests as qualifications for the employment of teachers upon the ground that no teacher was a party to this cause. Therefore there has been no express ruling of the lower Court on the constitutionality of religious tests for teachers.

On hearing before the Supreme Court of Florida on remand of the United States Supreme Court, the Court held that since Section 231.09 (2), Florida Statutes, relating to the reading of the Bible, when enacted in 1925

as Chapter 10263, contained prefatory language which indicated that said Statute had a secular rather than a religious purpose, and that daily Bible reading and recitation of the Lord's Prayer did not violate the proscription of the First Amendment.

FEDERAL QUESTIONS NOT PROPERLY RAISED

The questions stated by the Appellants are as follows:

(1) Is the Florida statute (Fla. Stats. (1961), Section 231.09) which requires the instructional staff of the public schools of the state to "Have, once every school day, readings in the presence of the pupils from the Holy Bible, without sectarian comment," invalid as being repugnant to the provisions of the First Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment, barring any " * * * law respecting an establishment of religion, or prohibiting the free exercise thereof * * * "?

(2) Are such provisions of the United States Constitution violated by any or all of the following practices of the appellee Dade County Board of Public Instruction:

(a) the regular reading of verses from the Holy Bible in assemblies and classrooms?

(b) the regular recitation of the Lord's Prayer and other religious and sectarian prayers?

(c) the conducting of religious and sectarian baccalaureate programs?

(d) the conducting of a religious census among the children to ascertain their own religious affiliations and the religious affiliation of their parents?

(e) the conducting of religious tests as a qualification for the employment of teachers?

(3) Is the above described statute or are any of the above described practices of the appellee Board of Public Instruction rendered constitutionally permissible by the fact that the appellee Board allows any pupil to be excused from Bible reading on the written request of his parent and permits any parent to request the release of his child from participating in any "non-academic activity" which he deems violative of his religious conscience?

All of the above questions were improperly raised in that there is no justiciable issue raised by these points and, in addition, the parents of the pupils had no standing to raise the questions set forth as (2) (c) (d) and (e).

ARGUMENT

I. In light of the Murray and Schempp cases, the Florida Supreme Court was correct in finding that the daily reading of the Bible did not violate the First Amendment to the Constitution since the Florida Statute, Section 231.09 (2) differs materially with the Statute and Rule of the Commonwealth of Pennsylvania and City of Baltimore respectively.

In the *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 83 Sup.Ct. 1560 (1963) the Commonwealth of Pennsylvania, by law, 24 Purdon's Pa. Stat. Ann. §15-1516, required that at least ten (10) verses of the Holy Bible shall be read without comment at the opening of each public school, on each school day. The above statute provided for the excusal upon written request of the parent or the guardian of the pupil. The recitation of the Lord's Prayer was a practice not required by the statute.

In the case of *Murray* v. *Curlett*, 374 U.S. 203, 83 Sup.Ct. 1560 (1963) Bible reading and the Lord's Prayer were the result of the adoption of a rule by the Board of School Commissioners of Baltimore City, pursuant to Art. 77, §202 of the Annotated Code of Maryland. The Rule provided for the holding of opening exercises in the schools of the City, the reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer.

Section 231.09(2) of the *Florida Statutes* was first enacted as Chapter 10263, Laws of 1925 and contained the following prefatory remarks:

> "Whereas, it is in the interest of good moral training, of a life of honorable thought and good citizenship that the public school children should have lessons of morality brought to their attention during their school days. It is therefore enacted . . . "

Speaking of Maryland's Sunday Closing Laws, Chief Justice Warren, in the case of *McGowan* v. *State of Maryland*, 366 U.S. 420, 81 Sup. Ct. 1101, 1115 (1961) states:

> "In light of the evolution of our Sunday Closing Laws through the centuries and of their more or less recent emphasis on secular considerations, it is not difficult to decide that as presently written and administered, most of them, at least, are of a secular rather than of a religious character, and that presently, they bear no relationship to establishment of religion as those words are used in the Constitution of the United States."

If the Supreme Court of the United States can construe a statute which had as its genesis a religious purpose, i.e., Sunday closing for the purpose of worship, to be in practice at the present time a law of secular purpose, i.e., recreation and relaxation of the people, then it would seem natural and provident for this Court to give effect to a statute which purpose is secular in nature by the intent of its framers. As in the *McGowan* case, the accommodation of the religious beliefs of a majority of the people is secondary to the primary intent of the legislators. We would submit that "good moral training" of future citizens, the inculcation of habits which would produce "a life

of honorable thought and good citizenship" of the future citizens is certainly a secular purpose and most desirable.

It is submitted that since the legislative intent in the *Schempp* and *Murray* cases was not exhibited in evidence or before the Court in any manner that this places the Florida Statute in an entirely different light than that in which the Pennsylvania Statute and the City of Baltimore Board of School Commissioners Rules were considered.

II. The appellants have no standing to complain of the conducting of religious and sectarian baccalaureate programs.

The evidence in this case clearly indicates that all of the children involved here save one were enrolled in elementary schools of the Dade County Public School System. The other child, the child of the Appellant Chamberlin, was at time of trial a sophomore at North Miami High School. The evidence clearly indicates that baccalaureate programs are conducted only on graduation from high school. (TR 1086)

Appellants asserting constitutional rights have no standing to sue unless adversely affected. *Poe v. Ullman*, 367 U.S. 497, 503-504, 81A Sup. Ct. 1752, 1756 (1961); *Tileston* v. *Ullman*, 318 U.S. 44, 63 Sup. Ct. 493 (1943); *Voeller* v. *Neilston Warehouse Co.*, 311 U.S. 531, 537, 61 Sup. Ct. 376, 378 (1941). A request for declaratory relief does not remove the requirement of standing. *Doremus* v. *Board of Education*, 342 U.S. 429, 72 Sup. Ct. 394 (1952); *Coffman* v. *Breeze Corporation*, 323 U.S. 316, 65 Sup. Ct. 298 (1945). The Supreme Court of the United States has long held that the rendering of advisory opin-

ions is a "function never conferred upon it by the Constitution, and against the exercise of which this Court has steadily set its face from the beginning." *Muskrat* v. *United States*, 219 U.S. 346, 362, 31 Sup. Ct. 250 (1911). The Appellants made no attempt in the trial of the case below to connect the practice complained of with their own children. None of the Appellants' children testified.

III. The appellants have no standing to raise the question concerning the conducting of the religious census among the children to ascertain their own religious affiliation and the religious affiliation of their parents.

The evidence at the trial indicated that permanent records are kept in the school system showing, among other things, religious preferences of pupils and their parents. (TR 537). However, there is no testimony in the record to indicate that any of the Appellants or their children had such a card or record or supplied such information to any person in the school system. Testimony was submitted as to isolated incidents of a poll being taken of the religious beliefs of the pupils at Palmetto High School (TR 1205-1207) and another instance in which a teacher polled the children of a class in North Miami Senior High School as to their religious preferences. (TR 345, 378). However, there was no evidence submitted connecting the children of these Appellants with such isolated incidents. In *Doremus* v. *Board of Education*, *supra*, the State Court rendered an opinion on a Federal constitutional problem under such circumstances as could only be regarded as advisory. This Court stated at 342 U.S. at 439:

> "We do not undertake to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory. But, because our own jurisdiction is cast in terms of 'case or controversy', we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such."

The United States Supreme Court has held that it will not pass upon the constitutionality of a complaint of one who fails to show that he was injured by the operation of the statute or practice. *Coffman* v. *Breeze Corporation*, 323 U.S. 316, 324-325, 65 Sup. Ct. 298, 303 (1945). Therefore since the Appellants have failed to connect their children with the taking of a religious census they cannot be heard to complain of the unconstitutionality of the practice as applied to others.

IV. The appellants have no standing to complain of the conducting of religious tests as a qualification for the employment of teachers.

The Appellants have no standing to question the constitutionality of asking prospective teachers whether they believe in God. Only teachers or applicants for teaching positions have the necessary justiciable interest to raise this issue. The Appellants have no standing to assert the rights of others. *Tileston* v. *Ullman*, 318 U.S. 44, 63 Sup. Ct. 493 (1943); *Tyler* v. *Judges of the Court of Registration*, 179 U.S. 405, 21 Sup. Ct. 206 (1900). With regard to the question of religious tests for teachers, the lower Court

has made no decision as to the constitutionality of the practice but rather has ruled from the inception that the Court had no question to decide since no teachers were Plaintiffs in this action. See Sup. Ct. Rule 16 (1) (b).

CONCLUSION

We respectfully submit, therefore, that the Appellants present no properly raised Federal question for the decision of this Court.

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THE BOARD OF PUBLIC INSTRUCTION
OF DADE COUNTY, FLORIDA

By George C. Bolles
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PROOF OF SERVICE

I HEREBY CERTIFY that on the 17 day of April, 1964, I served a copy of the foregoing Motion to Dismiss upon the following counsel of record:

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